

Chapter III

Labor Standards

Labor Standard Requirements

Development projects undertaken by HOME Contractors (State Recipients or CHDOs) may be subject to various federal (24 CFR Part 354, see **Appendix III-A**), and State wage and hour statutes and regulations. Since compliance with federal and State labor standards can have significant cost and time impacts, HOME Contractors should determine early in the project planning phase whether labor standards are required. The number of HOME units in a project, the project's funding sources, and the project's potential contractual relationships can all contribute to determining whether federal and/or State labor standards are triggered. HOME Contractors that have questions in regard to whether labor standard are triggered (or any other HOME labor requirements) should contact their HOME Representative for guidance and technical assistance. More subtle or complex questions will be referred by them to the HOME Program Labor Standards Specialist, who will obtain guidance from HUD as needed.

HOME Contractors who have concluded early in the project planning phase that federal or State labor standards **will** apply should be sure to adequately budget anticipated higher “hard” construction costs (normally in the range of 15-25% higher depending on type of work, architectural design, geographical area, etc.). A project with an inadequate construction budget can be difficult to complete successfully.

Federal Labor Standard Requirements

Every construction (rehabilitation or new) contract (not a “Standard Agreement”) with **12 or more HOME-assisted units** is required to comply with all of the following federal labor standards: the Davis Bacon and Related Acts (DBRA), the Copeland “Anti-Kickback” Act (the Anti-Kickback Act), the Contract Work Hours and Safety Standards Act, as amended (CWHSSA), and the Fair Labor Standards Act of 1938, as amended (FLSA). **Please note that construction projects with less than 12 HOME-assisted units are still subject to FSLA and may be subject to Section 3 requirements.**

The final determination of the number of HOME-assisted units is determined by your HOME Representative. Early consultation with your HOME Representative will help prevent unwanted and potentially costly surprises closer to actual construction time. The completion and submittal of all Labor Standard Requirements is a condition for the release of HOME funds.

Labor Standard Laws

- A. **The Davis-Bacon and Related Acts (referred to as DBRA)** published in Chapter 3, section 276(a) 7 et seq. of U.S.C. Title 40. The DBRA ensures that mechanics and laborers employed in construction work under federally-assisted contracts are paid wages and fringe benefits equal to those that prevail in the locality where the work is performed. According to the Department of Labor (DOL) regulations, the term mechanics and laborers "includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial..."

The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Laborers and mechanics include apprentices, trainees, and helpers. Categories of workers are considered not to be laborers or mechanics when, in the course of their duties, they perform no manual or physical work on the construction project, e.g., architects and engineers, timekeepers, and inspectors. Non-exempt working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 CFR 541, are laborers and mechanics for the time so spent. The working foreman is due the rate listed in the contract wage determination for the classification of work performed.

Owners of a subcontractor firm who are themselves performing the work of laborers and mechanics are entitled to the applicable prevailing wage rate for the classification of work performed. If the subcontract price covers the applicable prevailing wage rate for the number of hours worked as a laborer or mechanic on the job, the Department of Labor considers the owner/subcontractor to have been paid in compliance.

Prevailing wages are computed by the Department of Labor (DOL) and are issued in the form of federal wage decisions for each classification of work. In addition to the Davis-Bacon Act itself, Congress has added prevailing wage provisions to approximately 60 statutes which assist construction projects through grants, loans, loan guarantees, and insurance. These "related Acts" involve construction in such areas as transportation, housing, air and water pollution reduction, and health.

Required: All projects with 12 or more HOME-assisted units.

- B. **The Copeland "Anti-Kickback" Act (referred to as the Anti-Kickback Act)** published in Chapter 3, section 276(c) of U.S.C. Title 40. The Anti-Kickback Act requires that workers be paid unconditionally at least once a week without any deductions or rebates, except "permissible" deductions. Permissible deductions include taxes, deductions the worker authorizes in writing, and deductions required by court processes. It is a criminal offense to induce anyone employed on a federally assisted project to relinquish any compensation to which he/she is entitled.

The HOME Contractor must conduct interviews with employees to assure compliance with the terms of this Anti-Kickback Act. The contractor is required to maintain payroll records and to submit weekly certified payrolls with Statements of Compliance to the HOME Contractor documenting their compliance with the Anti-Kickback Act.

Required: All projects with 12 or more HOME-assisted units.

- C. **The Contract Work Hours and Safety Standards Act, as amended (referred to as CWHSSA)**, published in Chapter 5, Subchapter II, section 327 et seq. of U.S.C. Title 40. The CWHSSA requires that contractors pay mechanics and laborers employed on federally assisted construction jobs on the basis of a standard 40 hour work week and that they receive "overtime" compensation at a rate of one and one-half times their regular hourly wage for work in excess of 40 hours in one week. Contractors also may not require any laborer or mechanic to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous to their health or safety as determined by Department of Labor standards. Violation of the CWHSSA may result in the payment of liquidated damages.

Required: All projects with 12 or more HOME-assisted units.

- D. **The Fair Labor Standards Act of 1938, as amended (referred to as "the Act" or "FLSA")**, is published in Chapter 9, sections 201 et seq. of U.S.C. Title 29. The Act provides for minimum standards for both wages and overtime (O/T) entitlement, and spells out administrative procedures by which covered work time must be compensated. Included in the Act are provisions related to child labor, equal pay, and portal-to-portal activities. In addition, the Act exempts specified employees or groups of employees from the application of certain of its provisions.

Required: These standards are generally applicable to all labor performed but it may be preempted by other (often more stringent) federal standards such as the DBRA prevailing wage requirements and CWHSSA overtime provisions. Authority to administer and enforce FLSA provisions resides solely with the DOL.

Please refer to this chapter's appendix for additional information about the laws outlined above. The publications listed in the appendix provide detailed descriptions of the policies, procedures and responsibilities for the administration and enforcement of labor standards requirements in federally assisted housing developments. Since labor standards requirements cannot be waived or modified, you should review this material and become thoroughly familiar with its contents.

Determining the Number of HOME Assisted Units

A. Multifamily Projects

Determining the number of HOME-assisted units within a project is instrumental to ascertaining whether a project is required to comply with federal labor standards. HUD's guidance (see Labor Relations Letter "LR-96-02" in **Appendix III-B** and CPD Notice 98-02 in **Appendix III-C**) describes how determining the number of HOME-assisted units in multi-unit projects hinges

upon the proportion of HOME funds to other funding sources within the total HOME-eligible development costs. **The final determination of the number of HOME-assisted units in a project is determined by your HOME Representative prior to setup.** Your HOME Representative utilizes and relies upon the information supplied by the HOME Contractor in making this determination. Prior to setup the HOME Contractor must submit documentation that supports the number of HOME units that they are requesting to be setup. It is **extremely** important that the information provided be accurate to ensure that the project is setup in a timely manner. In multi-unit projects, the number of HOME units is obtained by either one of two methods:

1. **Pro-Rating applies:** if unit sizes and amenities are comparable, the number of HOME-assisted units is obtained by calculating that portion of HOME-eligible development costs which are funded by HOME. For example, if 50% of the eligible development costs are paid with HOME funds, then 50% of the units would be HOME-assisted, provided the HOME share per unit does not exceed the maximum per-unit subsidy limit (HUD Section 221(d)(3)).
2. **Cost Allocation applies:** if unit size and amenities are not comparable throughout the project, particular units that will remain permanently HOME-assisted must be identified, and costs attributed to them. The maximum HOME expenditure per unit must not exceed the maximum per-unit subsidy (HUD Section 221(d)(3)).

The number of HOME-assisted units will be listed by the HOME Contractor in Part B., Box #7 of the "Homeownership Assistance/Rental Housing Project Set-Up Report" (HOME-7) which will be filled out for each project. The figure in that is listed in Box #7 will either be accepted or rejected by your HOME Representative as the number of HOME units. If the number of HOME-assisted units is 12 or greater, all federal labor standards apply. If the number of HOME-assisted units is 11 or fewer, then federal wage provisions do not apply, but FSLA does apply.

B. Single-Family Projects

In single-family projects federal wage and labor standards may apply (see Labor Relations Letter "LR-96-02" in **Appendix III-B** and CPD Notice 98-02 in **Appendix III-C**). If any one of the following pertains to your project:

1. HOME funds will finance site improvements (or construction) for a subdivision that will contain 12 or more HOME-assisted single family homes.
2. Precedent to construction there is an agreement with the owner or developer that stipulates HOME funds will be used to assist homebuyers to buy 12 or more homes within a project, regardless of whether there are less than 12 HOME-assisted units within each construction contract. **(Please note that the use of multiple construction contracts within a single project for the purposes of avoiding wage provisions is not permitted [24 CFR 92.354(a)(2)].)**
3. The HOME Contractor owns 12 or more lots through the construction period and has the homes built under a single construction contract.

HOME Contractors should always consult their HOME Representative about ambiguous situations (e.g., site development of a single-family tract under one construction contract and subsequent sale and development of individual lots).

General Requirements to be Contained in All Construction Contracts

It is imperative that all State Recipients and CHDO's read the following Contract Management Chapters **before** going out to bid on, or entering into any construction related contract: Chapter IV: Procurement and Chapter IX: Equal Opportunity & 504 Requirements. The follow are a selection of several contract related requirements (the list is **NOT** all inclusive):

- **All contracts** shall contain:
 - **Access and Retention of Records (24 CFR 92.508)** The HOME recipient, the State of California, the U.S. Department of Housing and Urban Development, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to this specific contract, for the purpose of making audit, examination, excerpts, and transcriptions. All required records must be maintained by the contractor for three years after grantee makes final payments and all other pending matters are closed.
 - **Certification Regarding Debarment, Suspension and Other Responsibility Matters** (see Contract Management Manual Appendix IV-A)
 - **The Civil Rights, HCD and Age Discrimination Act Assurances** (see Contract Management Manual Appendix IX-A)
 - **State Nondiscrimination Clause** (see Contract Management Manual Appendix IX-A)
- **All contracts over \$10,000** shall contain:
 - **Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity** (see Contract Management Manual Appendix IX-B) - Executive Order 11246 as amended by E.O. 11375 (41 CFR Part 60 – 4.2(d)) - used in bids.
 - **Standard Equal Opportunity Clause** (see Contract Management Manual Appendix IX-E) – used in contracts.
 - **Standard Federal Equal Employment Opportunity Construction Contract Specifications** – (see Contract Management Manual Appendix IX-F) - Executive Order 11246 as amended by E.O. 11375) (41 CFR 60-4.3(a)) – used in contracts.
- **All contracts over \$100,000** shall contain:
 - **Clean Air Act and the Federal Water Pollution Control Act as amended.**
 - **Section 3 Clause.** In projects involving construction where **federal funding exceeds \$200,000 and any individual contract or subcontract exceeds \$100,000**, the Contractor shall have incorporated into their contract the Section 3 clause (see Contract Management Manual Appendix IX-F1) and comply with the provisions of **Section 3 of the Housing and Urban Development Act of 1968, as amended (12 U.S.C. 1701u), and regulations at 24 CFR Part 135**. Section 3 requires that, to the greatest extent possible: a) Training and employment opportunities shall be made available to low-income residents of the metropolitan area in which the project is located; and b)

Subcontracts shall be awarded to businesses owned by low-income residents or to businesses in which at least 30% of their permanent employees are low-income residents. The Contractor shall include a Section 3 clause in every subcontract for work in connection with the project. The Contractor will not subcontract with any subcontractor where it has notice that the latter has been found in violation of regulations under 24 CFR Part 135 and will not let any subcontract unless the subcontractor has first provided a preliminary statement of ability to comply with the requirements of these regulations.

- **Prohibition on the Use of Federal Funds for Lobbying** - Bird Anti-Lobbying Amendment (Section 319 of Public Law 101-121)

HOME Contractor Responsibilities (if Federal Labor Provisions DO NOT Apply)

- Notify your HOME Representative as soon as possible after receiving the funding commitment that the project is not bound by federal labor standards. Document how this conclusion was reached by calculating the number of HOME-assisted units by either the prorating or cost allocation method.
- Receive written confirmation from the HOME Representative agreeing with this conclusion. Keep this confirmation in the project files.
- Notify your HOME Representative as soon as possible if there is any change (additional funding sources or requirements, change in the number of HOME-assisted units, etc.) that might affect the application of federal labor provisions.
- Follow good practices in planning for and administering construction activities by determining contractor eligibility (by obtaining verification that all proposed contractors are licensed by the California Contractors License Board and certification that the contractors and subcontractors have not been debarred or suspended from participation in a transaction with any federal agency), negotiating contracts, holding a pre-construction conference, etc.
- **Any party that is debarred or in a suspended condition shall be prohibited from participation in the State of California HOME Program as long as they are classified in this manner; and State Recipients are prohibited from knowingly entering into a covered transaction with a person/corporation/organization, who is suspended, debarred, ineligible, or voluntarily excluded from participation in federally funded programs.**

The Certification provided in Chapter IV, Appendix IV-A, must be completed for all subcontracts, purchase orders and other contracts that are bid upon or entered into by the HOME Contractor. The language in this certification must also be included in all solicitations or contracts for covered activities. Please note that the solicitations or contracts needn't involve construction, e.g., the language in this certification equally applies to HOME administrative subcontractors. The HOME Contractor shall submit to their HOME Representative a copy of all executed Certifications within 10 days of their execution.

Projects will be evaluated at setup and at each disbursement to ensure that all required certifications have been submitted.

- CHDOs should consult with their HOME Representative to determine to what extent HCD will be involved in construction planning and disbursement issues.
- Remember that FLSA applies, even if the wage payment portions of the DBRA do not.

HOME Contractor Responsibilities (if Federal Labor Provisions DO Apply)

- Notify your HOME Representative as soon as possible after receiving the funding commitment that the project is bound by federal labor standards. Document how this conclusion was reached by calculating the number of HOME-assisted units by either the prorating or cost allocation method.
- Receive written confirmation from the HOME Representative agreeing with this conclusion. Keep this confirmation in project files.
- If calculations indicate that DBRA wage provisions **do** apply, and you are a: 1) public agency, then immediately appoint a staff member to function as the Labor Standards Compliance Officer (See **Appendix III-D**) for the project, or 2) CHDO, then immediately retain professional assistance from the local government or hire a private consultant to function as Labor Standards Coordinator for the project (See **Appendix III-D**). The consultant must not be a CHDO employee. **No HOME Program Rental Housing Project Set-Up Report (HOME-7) will be set-up without the appointment of a Labor Standards Compliance Officer/Coordinator.**

The Labor Standards Compliance Officer/Coordinator is responsible for ensuring that the State Recipient/CHDO and their borrower complies with and enforces the labor standards requirements and maintaining the project's labor compliance file. The Officer/Coordinator's duties include (at a minimum):

- 1) Visit the construction site to confirm the required posters ("Notice to Employees," "Job Safety and Health Protection" and "Equal Employment Opportunity" and correct wage determinations) are posted in clear view of employees.
- 2) Collect and examine the contractor's and subcontractor's weekly payrolls against the wage decision to ensure compliance with prevailing wage. The payrolls should be reviewed as they are submitted so that any necessary corrective action can be initiated immediately. Items to be reviewed include classification of workers, comparison between the classification and wage to verify the rate is at least equal to that required by the wage rate determination; overtime pay, if applicable; deductions; apprentice/trainee information and statement of compliance signature by owner or officer of contractor.

- 3) Conduct employee interviews. The number of interviews must be sufficient to establish compliance and must represent all classifications of employees.
- 4) Throughout the planning, pre-construction, and construction phases, use and maintain an up-to-date “Construction Checklist,” located in **Appendix III-E**.
- 5) File that includes, but is not limited to the following:
 - Preliminary Design and Cost Estimates
 - Final architectural/engineering design plans/specifications and cost Estimates
 - **Appointment of Labor Compliance Officer/Coordinator Resolution**
 - **“Request for Wage Determination and Response to Request – SF-308 form”**
 - Construction bid package (with required **Federal Labor Standard Provisions, HUD Form-4010 and Wage Determination**).
 - Approval of Bid Documents by authorities having jurisdiction over the project
 - Proof of Publication advertising bids
 - Documentation of efforts to solicit minority/women contractor participation
 - Bid opening minutes, bid tabulations
 - Evidence of bidders’ receipt of addenda (if applicable)
 - Wage decision verification ten days prior to bid opening
 - Verification of contractor eligibility – including **debarment certification**
 - Written recommendation for award of contract
 - Executed Construction contract(s) (with required Federal labor standards provisions)
 - Payment/Performance Bonding Documentation
 - Notice/pre-construction conference minutes
 - Start of Construction Notice/notice to proceed
 - Approved Change Orders/ Architectural Directives
 - **Additional Classification and Rate Request (HUD 4230-A) - if applicable**
 - **Contractor/subcontractor weekly payrolls (Wage and Hour Contractor Payroll Form (WH-347)) along with Statement of Compliance (Form WH-348)** signed by an officer of the company and evidence of review (initialed/dated by Officer/Coordinator)
 - **Monthly Employee Interview HUD-11 (or equivalent) forms** (including Section 3 interviews, if applicable) and evidence of review (initialed/dated by Officer/Coordinator)
 - Evidence that payrolls were checked against the federal wage determination
 - Evidence of apprenticeship/trainee registration and certification if apprentice or trainee rates were paid
 - Payroll deduction authorizations
 - Evidence of restitution/resolution of identified discrepancies

- Complaints from workers, if any, and actions taken
- Labor Standards Compliance Report(s), if any
- Monitoring and Inspection (Interim and Final) Reports
- Certificate of Construction Completion
- Final Wage Compliance Report
- Verification of job site posting (“Notice to Employees,” “Job Safety and Health Protection” and “Equal Employment Opportunity” and correct wage determinations) are posted in clear view of employees
- Other related correspondence

A. Pre-construction Activities Requirements

1. Prevailing Wage Determinations

Exceptions

The wage rate determinations and federal labor standards provisions do not apply in all instances. The following activities and types of workers are exempt:

- **Delivery of machinery, goods, and/or services** is exempt, as long as installation, rehabilitation or new construction is involved.
- **Volunteer workers.** Persons may be considered volunteers only when their services are offered freely and without pressure or coercion, directly or implied, from an employer. Volunteers on construction work that is otherwise subject to Davis-Bacon prevailing wage rate requirements under 24 CFR 92.354 must meet the criteria in 24 CFR 92.354(b); that is **they may** receive reimbursement for paid expenses, reasonable benefits or a nominal fee to perform the services for which they volunteered, **but in no case** shall such benefits be construed in any way as paid compensation nor may they be employed at any time in construction work.. Also, 24 CFR Part 70 (Use of Volunteers on Projects Subject To Davis-Bacon And HUD-Determined Wage Rates) applies to volunteers, and requires that a HUD determination must be requested regarding whether any proposed payments to volunteers meet the criteria in 24 CFR 70.3(b).
- **Skilled Labor or Professional Services:** According to Section 92.220 (a)(8) of the HOME regulations, the value of skilled labor or professional services is determined by the rate that the individual or entity performing the labor or service normally charges.
- **“Sweat equity”** contributions (i.e., members of an eligible family who provide labor in exchange for acquisition of a property for homeownership or provide labor in lieu of, or as a supplement to, rent payments);

- **Apprentices** who are individually registered in a DOL-approved apprenticeship program may work at less than the prevailing wage rate if they are employed within the acceptable ratio to journeypersons and meet other labor standards contract provisions; and
- **Trainees** who are employed under a DOL-approved program and meet other labor standards contract provisions.
- **In-Kind Construction Service (“force account labor”)** that is provided by the jurisdiction. Workers performing this work are paid at their standard rate of pay, even if it is less than prevailing wage rates. The laborer performs their work under their current work description and during their normal work hours.

Note: So-called “helper” classifications were formally suspended by DOL on October 21, 1993. Wage Determinations no longer identify these positions and workers may not be paid as helpers. Only journeymen, laborers, and approved apprentices can do construction work on federally funded projects.

Applicable

When federal labor standards provisions apply labors are required to be paid prevailing wages. As a general rule, the wage determination incorporated into a bid solicitation and related contract award establishes the minimum wage rates and fringe benefits which must be paid for the entire term of the contract.

- Request the federal wage determination applicable to the geographic area where the project is located. The HOME Contractor **is required** to obtain wage determinations from your HOME Representative. To obtain your wage determinations the HOME Contractor should submit “Request for Wage Determination and Response to Request – SF-308 form” (**Appendix III-F**). It is extremely important that wage determinations be requested for each individual project. Each request must be made to the Department in sufficient time (at least 20 calendar days prior to advertising for bids) to allow for processing. A full description of the work to be performed must be provided on the SF-308 form. This process should assure the issuance of the appropriate wage determination.
- However, General Wage Determinations do not include an expiration date. General Wage Determinations may be modified by DOL at any time. The Labor Standards Compliance Officer/Coordinator is responsible for contacting the HOME program via the “Davis Bacon: 10 Day Prior to Bid Opening” fax (**Appendix III-G**) addressed to the Project’s HOME Representative (916-322-2904). The fax **must** be received by the HOME Program no later than noon on the day that is exactly 10 days prior to bid opening. If this day falls on a weekend or holiday, it must be faxed no later than noon of the day before such day.
- The fax **must** be followed with a phone call to the Project’s HOME Representative (916-322-0356.) The following steps should be followed when the Labor Standards Compliance Officer/Coordinator makes their call:

- 1) State the purpose of their call, i.e., that they are calling for the 10 day prior to Bid Opening Wage Decision update;
- 2) Your HOME Representative (or backup) will determine whether the wage decision you received initially is still current. The HOME Representative will fax back a response before 5pm that same day to assure you that the wage determination has not been modified or it has been superseded. If the wage determination has been superceded or modified the entire wage determination will be faxed to you. It is required that the HOME Contractor incorporate into their bid package any wage modifications.

If the contract is not awarded within 90 days of bid opening, a new Wage Determination must be obtained, which may affect project cost. If a current wage decision is not used, the borrower may be liable for the difference between the wage rates used in the bid documents and the current rates. The contractor and all subcontractors must apply the most recent wage decisions.

If the Classifications and rates needed are not listed on the wage determination issued then the Department should be contacted and advised of the classification(s) desired. It may be possible to conform a classification to another classification on the wage determination, provided it is a prevailing practice in the area. If the classification cannot be conformed, a completed HUD 4230-A (Additional Classification and Rate Request) must be submitted to the State of California HOME Labor Standards Specialist in order to determine the classification and rate for the needed craft(s) (see **Appendix III-H**).

This should **ONLY** be submitted **AFTER** there is a signed contract between the developer and the contractor. After the request is received it will be reviewed by the HOME Labor Standards Specialist based on the requirements of 29CFR§5.5(a)(1)(ii)(A):

The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met: (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and (2) The classification is utilized in the area by the construction industry; and (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

The HOME Labor Standards Specialist, after reviewing it, will forward the request to the Department of Labor (DOL) in Washington, D.C. Please expect that it will take a minimum of 45 days for the DOL to respond back.

2. Request for Bids

- Include the “Federal Labor Standards Provisions” (**Appendix III-I**) and the full wage determinations in the project bid package when it is distributed to potential bidders. Wage determinations must be included in all bid specifications, bid documents, and contracts.

Please note that failure to include a wage determination, or the use of a wrong determination in all bid specifications, bid documents, and contracts, will not relieve the HOME Contractor or borrower from potential enforcement action. Inclusion by reference of either the Federal Labor Standards Provisions or wage determinations is not acceptable.

- Obtain an updated Wage Determination before going out to bid. Federal Regulations (29 CFR Part 1(c)(3)(i)) state that the latest determination in effect at the time of bid opening (unless published less than 10 days previously) will be effective. The possibility of updates affecting project labor costs should be communicated clearly to potential bidders.
- Check the HUD web site to ensure that the successful bidder is not on the federal list of debarred or suspended contractors and therefore deemed ineligible, at <http://epls.arnet.gov/>.
- Check with the selected contractor that they are willing to accept the applicable wage rate determinations and will be willing to sign a certification to pay Davis Bacon wages (at least once a week) and comply with the other applicable federal labor standards including the reporting of all suspected or confirmed violations of over \$100 and if necessary the preparation of a supplemental payroll to make appropriate restitution to affected employees.

3. Certification Regarding Debarment, Suspension and Other Responsibility Matters

- **Any party that is debarred or in a suspended condition shall be prohibited from participation in the State of California HOME Program as long as they are classified in this manner; and State Recipients are prohibited from knowingly entering into a covered transaction with a person/corporation/organization, who is suspended, debarred, ineligible, or voluntarily excluded from participation in federally funded programs.**

The Certification provided in Chapter IV, **Appendix IV-A**, must be completed for all subcontracts, purchase orders and other contracts that are bid upon or entered into by the HOME Contractor. The language in this certification must also be included in all solicitations or contracts for covered activities. Please note that the solicitations or contracts needn't involve construction, e.g., the language in this certification equally applies to HOME administrative subcontractors. The HOME Contractor shall submit to their HOME Representative a copy of all executed Certifications within 10 days of their execution. Projects will be evaluated at setup and at each disbursement to ensure that all required certifications have been submitted.

4. Contract Award/Pre-construction Conference/Start of Construction

- The borrower must have a formal construction contract with the selected general contractor. Where there is not a general contractor and all work is to be performed by individual subcontractors, the borrower must have formal construction contracts between all individual subcontractors. All construction contracts must contain Davis Bacon language binding the

contractor to Davis Bacon requirements. Send a “Notice of Contract Award/Pre-construction Conference/Start of Construction” (**Appendix III-J**) to your HOME Representative within 10 working days of contract award. This Notice provides, along with other information, the name of the person responsible for labor standards compliance.

- Although HUD no longer requires a preconstruction conference for federal labor standard purposes, it is still considered best practices to do so. After the construction contract is awarded hold a pre-construction conference with the borrower, the primary(general) contractor, the foreman or construction superintendent, the person on staff who will be preparing payrolls, as well as all identified subcontractors who have been awarded contracts. The purpose of this conference is to review thoroughly the federal labor standards, construction inspections, progress/contractor payments, Section 3 employment/training, equal opportunity requirements, reporting procedures and other unique circumstances associated with the project. Sample minutes to be used in a preconstruction conference are provided in **Appendix III-K**.

B. Construction Requirements

- **Notices for Job Site.** Applicable wage decisions and rates must be posted at the work site for the duration of the contract work. Development files should document that a site visit was made and that wage rates, notices, and weekly sign-in sheets were posted at the site.
- **Payroll Report and Statement of Compliance.** The contractors and all subcontractors working on the development must submit weekly to the Labor Standards Compliance Officer/Coordinator assigned to the development: 1) a list showing all contractors/subcontractors working on the development during the workweek and 2) a payroll report. The use of the Department of Labor Payroll Report, Form WH-347 (<http://www.dol.gov/esa/forms/whd/wh347.pdf>, instructions: <http://www.dol.gov/esa/forms/whd/wh347instr.htm>), is recommended but not required. Providing an alternative payroll form or computer printout is acceptable; however, the form must include all information that is required on the WH-347. In addition, if an alternative form is used, a Statement of Compliance Form WH-348 must also be included. All statements of compliance that are either part of the original payroll or attached to an alternative payroll form must include an original signature by the person authorized to certify payrolls on behalf of each contractor/subcontractor. Photocopied signatures, computer generated signatures, stamped signatures etc... are not acceptable.

The original weekly payroll report must be provided to the Labor Compliance Officer/Coordinator for each contractor/subcontractor with employees working at any time during the week. Payrolls must be numbered consecutively with the initial and final reports indicated, and a completed and signed Statement of Compliance must accompany each report (Forms WH-347 and WH-348). These submittals must be made no later than seven (7) days following the reporting period covered by the payroll reports. Payroll reports submitted incompletely or incorrectly must be photocopied and the copy returned to the employer for correction. Incomplete or incorrect reports may delay payment.

- **Monitor weekly payroll reports supplied by contractor and subcontractor.** Review the weekly payroll reports as they are submitted. Wage rates reported on the payroll forms should be compared with the rates in the applicable wage decisions. The payroll reports also should be sequentially numbered beginning with the earliest payroll submitted. Some of the items of that the Labor Standards Officer/Coordinator must monitor are:
 - Appropriate wages are being paid
 - Current weekly payroll reports for those on the job are submitted on a timely basis
 - Employee interviews are conducted from a representative sample of all job classifications
 - Weekly reports of subcontractors on the job are completed for each week on the job site
 - Documentation that appropriate notices and wage determination are posted at the job site
- **Conduct job site employee interviews,** per HUD guidance. The purpose of Labor Standards Officer/Coordinator conducting interviews with employees of the contractor and or subcontractors to verify that classifications and wage rates are reported accurately on the payroll reports. Employee interviews must be sufficient to establish the degree of compliance and to indicate the nature and extent of violations, if any. They must also be representative of all classifications of employees on the project. Every effort should be made, within existing staffing levels, to interview up to 10 percent of the workers in all trades on long-term projects (more than six months). A representative sample of all trades on short-term projects should be interviewed. The Record of Employee Interview Form (HUD-II) should be used for this purpose. These reports should remain confidential and not be discussed with interviewee's employers.
 - Upon discovery of any inconsistencies or deliberate deception on the part of any contractor or subcontractor, take immediate steps to work with that contractor to resolve the problem. Should the contractor fail to comply with requests to remedy the situation, contact your HOME Representative for advice and assistance.
- **Report of Wage Restitution.** If any underpayment violations of labor standards are discovered, notify the contractor so that corrective action may be taken immediately. Any underpayment violations must be reported to your HOME Representative using a wage restitution form that includes: the calculation of employee restitution and proof of employee restitution. Submit this form to your HOME Representative at the time of restitution. Please note: the data privacy act and confidentiality laws cover payrolls, employee interviews, and similar information, and such information should be treated accordingly.
- **Weekly Report of Subcontractors on Job Site.** This report should include at minimum: The firms (subcontractor's name) and the day of the week the firm worked on the project. It should be signed by the general contractor and posted at the job site. Each week the subcontractors who are actively employed in the construction need to be recorded on this form and submitted to the Labor Standards Officer/Coordinator at the time of payroll submission. If no subcontractor employees worked at the site during the week, state none. This report is for the use as a crosschecking tool in monitoring for compliance with labor standards.

- **Borrower's Letter Certifying Compliance.** Upon project completion, the HOME Contractor is required to submit a letter to their HOME Representative certifying compliance with all Davis-Bacon Labor Standards requirements. Any outstanding issues (or non-compliance) must be remedied prior to final disbursement of project funds.
- **Disputes Concerning Labor Standards and Payment of Wages.** Disputes arising out of Labor Standards Provisions should be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR, Parts 5, 6 and 7, including disputes between the contractor (or any subcontractor) and the HOME Labor Specialist, HUD, the Department of Labor, or the employees or their representatives. Procedures include review of disputes by HOME Labor Specialist, HUD staff, and the U.S. Department of Labor.

If a contractor or subcontractor disagrees with the HOME Specialist findings concerning payment of prevailing wage rates, overtime pay, or proper classifications, the contractor or subcontractor must submit a written explanation (along with supporting documentation) of the disagreement, within 30 days of notification of findings. The HOME Program will review the submitted information to determine if the disagreement is justified and will notify the HOME Contractor of the determination. If the HOME Contractor is not satisfied with the HOME Program's determination concerning any disputes/disagreements, the case may be referred to HUD and/or the U.S. Department of Labor for appropriate ruling on the case, and/or interpretation of the rules under Title 29 CFR.

- **Final Wage Compliance Report (Appendix III-L).** File the Report with your HOME Representative within 30 days (or 60 days if an investigation of underpayment is taking place) of completion of the project.
- **File semi-annual Federal Labor Standards Enforcement Reports** with your HOME Representative (**Appendix III-M**) by April 5 (October 1 through March 31 reporting period) and October 5 (April 1 through September 30 reporting period) each year. These reports are needed in order to document compliance with and enforcement of the labor standards provisions of the DBRA and its related acts. The Department compiles the submitted information and then furnishes it to HUD.

C. Recordkeeping Requirements

HOME Contractors should keep scrupulous records of all activities and actions related to federal labor standards compliance. Records should be maintained in one place. The federal labor standards records must be retained for a period of five years after completion of a project.

The information provided on DBRA compliance is not intended as a full or complete description of your labor standards responsibilities or obligations. It is extremely important that the Labor Standards Officer/Coordinator have a working knowledge of the HUD Labor Standards. You are strongly encouraged to contact your HOME Representative with any questions that may arise in regard to labor standards issues and compliance.

State of California Labor Provisions

Notice: The Department of Industrial Relations is the ONLY body that can officially interpret California labor provisions, State Recipients and CHDOs should therefore consult the Department of Industrial Relations if they have any questions as to whether their HOME construction-related activity triggers State prevailing wage and overtime provisions. Please note that the presumption is that state of California HOME funds triggers state prevailing wages unless the activity is specifically exempted by SB 975 or SB 972.

Prior to 2002 State prevailing wages were paid on “public work” projects and the term, “public works” had the commonly held meaning of “fixed works of construction for public use,” e.g., schools, roads, fire/police stations, etc. When “public works” were funded “in whole or in part” with public funds State prevailing wages were paid to both public and private/nonprofit developers. HOME-funded projects were exempt from State of California Labor Code provisions, including the payment of State Prevailing Wages (Sec. 1771) and overtime (Section 1815), unless the projects were developed, owned, or managed by local government or other local public agencies.

With the passage and signing of Senate Bill 975 (SB 975 - Alarcon) the definition of “public works” was greatly expanded to include both public and private projects that are funded by public funds. The law became effective January 1, 2002 (Chapter 938, Statutes of 2001) and amended Section 63036 of the Government Code and Section 1720 of the Labor Code.

The new law required that prevailing wages be paid on all “public works” projects. A “public works” project was defined as any project (construction, alteration, demolition or repair work) over \$1,000 that is paid for in whole or in part with public funds (this includes State of California HOME money). The term “Construction” was expanded to include work performed during the design and reconstruction phases of construction including, but not limited to, inspection and land surveying work. HOME-funded construction projects are subject to State of California Labor Code provisions, including the payment of State Prevailing Wages (Sec. 1771) and overtime (Section 1815) unless they are specifically exempted under SB 975 or SB 972.

State prevailing wages (California Labor Code § 1720(b)) is now triggered if any "political subdivision" of the state (including any county, city, district, public housing authority, or public agency of the state, and assessment or improvement districts:

- (1) Pays money or the equivalent directly to or on behalf of the contractor, subcontractor, or developer.
- (2) Performs construction (or any improvement) work related to the private project.
- (3) Transfers an asset, e.g., real estate, buildings for less than “fair market price.”
- (4) Fees, costs, rents, insurance or bond premiums, loans, interest rates, or other obligations that would normally be required in the execution of the contract, that are paid, reduced, charged at less than fair market value, waived, or forgiven.
- (5) Money is loaned (or advanced) where repayment is on a contingent basis or repayment will be forgiven, e.g., based on project’s performance.
- (6) Credits (sales tax or tax increments generated by the development) to the public agency are applied to reduce the developer repayment obligations

SB 975 specifically exempted from State prevailing wages:

- (1) The reimbursing of a developer for costs that would normally be borne by the public or the public subsidy is de minimis in the context of the project (Source: California Labor Code § 1720(c)).
- (2) Projects funded solely with redevelopment money for low and moderate income or housing, projects funded with low income housing tax credits (until 12/31/03).
- (3) “Qualified” residential rental projects financed in whole or part through the issuance of tax exempt private activity bonds (until 12/31/03).

Senate Bill 972 (SB 972 – Costa) became effective January 1, 2003 (Chapter 1048, Statutes of 2002).

SB 972 clarified and provided additional exemptions from prevailing wage requirements imposed by SB 975. The intent of SB 975 was to create a limited number of exemptions from State prevailing wage laws; however, SB 975 was vague in its reference to the use of public funds in the construction/ rehabilitation of affordable housing units for low to moderate-income persons. SB 972 clarified this language by exempting from prevailing wage requirements construction or rehabilitation of privately-owned residential projects if one or more of the following provisions apply:

- a) The project is a **self-help housing project** in which no less than 500 hours of construction work associated with the homes is performed by the homebuyers;
- b) The project consists of **rehabilitation or expansion work associated with a facility operated on a not-for-profit basis as temporary or transitional housing for homeless persons** with a total project cost of less than \$25,000;
- c) Assistance is provided to a household as either **mortgage assistance, down-payment assistance, or for the rehabilitation of a single-family home**;
- d) The project consists of **new construction, or expansion, or rehabilitation work associated with a facility developed by a nonprofit organization to be operated on a not-for-profit basis to provide emergency or transitional shelter** and ancillary services and assistance to homeless adults and children. Additionally, the nonprofit organization operating the project is required to provide, at no profit, not less than 50% of the total project cost from nonpublic sources, excluding real property that is transferred or leased. Total project cost includes the value of donated labor, materials, architectural, and engineering services.
- e) The public participation in the project is **public funding in the form of below-market interest rate (BMIR) loans** for a project in which occupancy of at least 40% of the units is restricted for at least 20 years to individuals or families earning no more than 80% of the area median income.

Notwithstanding the above exemptions State prevailing wages may still apply if State prevailing wages is: 1) a requirement of a local ordinance; or 2) a requirement of another public funding program (e.g., the State MHP program); or 3) triggered by a form of public participation (e.g., a grant or “forgivable loan” or other non-loan assistance).

The responsibility for determining the applicability of State prevailing wage is given to the “awarding body.” Under State of California Labor Code Section 1772, the State of California HOME program is not the “awarding body” for construction-related activities. The State HOME program does not award the construction-related contract. The “awarding bodies” in the State HOME program may be the: 1) State Recipient, 2) Developer or 3) CHDO.

Because the State HOME program is not the State administrative agency charged with interpreting and implementing the provisions of State prevailing wages, the State HOME program is not in a position to advise you definitively regarding any compliance requirements. The State Recipient and CHDO must complete State of California Prevailing Wage –Certification (**Attachment III-N**) for each project and program prior to setup. CHDO’s should also refer to Management Memorandum 02-01 (**Attachment III-O**).

Effective January 1, 2004, SB 966 (Alarcon) authorizes a contractor to bring a court action to recover from a public agency any increased costs incurred by the contractor as a result of a local decision that “classifies the project as a public work” or any “change” that results in results in a state prevailing wage determination being made after the awarding body has accepted the contractor’s bid or the job has begun. SB 966 could potentially fiscally impact public agencies even if they are limited to a funding agency role and do not have a direct contract with the contractor. The aforementioned conclusion is based on the newly amended Section 1781(a)(1) of the State Labor Code; it states in part:

This bill would also authorize a contractor to bring an action to recover from the body awarding a contract for a public work *or otherwise undertaking* any public work any increased costs, as defined, incurred by the contractor if certain conditions are met. (*Emphasis added*)

SB 966 should be taken into consideration when a jurisdiction or CHDO completes the State of California Prevailing Wage –Certification. The contractor may reasonably and detrimentally be relying upon your representations. These representations may have unforeseen fiscal consequences under SB 966.

The Department of Industrial Relations (DIR) issued an advisory on November 5, 2001 stating that the terms of SB 975 “will be strictly enforced for all public works projects advertised for bids on or after January 1, 2002.” Most construction-related assistance provided by HOME is covered under this definition of public works. The body awarding the HOME construction-related assistance is the body that is held responsible by DIR for following State of California prevailing wage law.

The DIR has 180 days to bring a prevailing wage claim against the “awarding body” after the later of either (1) the filing of a valid notice of completion, or (2) acceptance of the construction-related assistance, to serve an assessment describing the nature of the prevailing wage law violation and the amount of wages, penalties, and forfeitures due (Section 1741 of the State of California Labor Code). Section 1741 also provides for an additional 180 days for DIR to serve an assessment (up to the amount of the retention) if the awarding body has not yet made full payment to the contractor.

Sections 1726-1729 of the State of California Labor Code provides that if prevailing wage law is violated the “awarding body” is given the authority to withhold funds from the contractor (DIR can also require that the funds be withheld). This same principle of withholding funds extends to the subcontractor.

Under Section 1775(b) of the State of California Labor Code a prime contractor is not liable for a subcontractor’s compliance with State prevailing wage laws if: 1) The prime contractor had no knowledge of the failure of the subcontractor to pay prevailing wages to his workers, or 2) The prime contractor complied with all of the following requirements: a) Included the required prevailing wage language in its contracts with the subcontractor; b) Monitored the payment of prevailing wages; c) Upon becoming aware of the failure of the subcontractor to pay prevailing wages, the contractor took corrective action, including, retaining sufficient funds due the subcontractor; and d) Prior to making final payment to the subcontractor the contractor obtains an affidavit from the subcontractor that the subcontractor has paid his workers prevailing wages.

Four Examples of Prevailing Wage Projects

In ascertaining the triggering of State prevailing wage and overtime provisions the State Recipient and CHDO must consider all of the funding sources and project configuration. The following are four examples:

- 1) A 60 unit project funded with HOME funds and State Multifamily Housing Program (MHP) funds. HOME is funding 11 units and MHP is funding the other 49. The entire project is restricted for 55 years to individuals and families earning no more than 80% of the area median income. This project **is subject** to State prevailing wages (triggered by use of MHP funds).
- 2) A 60 unit project funded with HOME funds and State Multifamily Housing Program (MHP) funds. The entire project is restricted for 55 years to individuals and families earning no more than 80% of the area median income. HOME is funding 12 units and MHP is funding the other 38. This project **is subject** to both State prevailing wages (triggered by the use of MHP funds) and DBRA (triggered by the 12 HOME units). The project would have to meet the strictest requirements (e.g. highest wages) of the applicable provisions.
- 3) A 60 unit project funded with HOME funds and Low Income Housing Tax Credits (awarded **after** to December 31, 2003). HOME is funding 11 units and Low Income Housing Tax Credits are funding 49. This project **is subject** to State prevailing wages (triggered by Low Income Tax credits).
- 4) A 60 unit project funded with HOME funds and a commercial bank loan. HOME is funding 24 units (40%) and the remaining 36 units (60%) are funded with a commercial bank loan. The entire project is restricted for 40 years to individuals and families earning no more than 80% of the area median income. This project is subject to Davis Bacon (triggered by the 24 HOME units) but **not subject** to State Prevailing wages (exempted by section 1720 (c)(6)(E) of the State Labor Code).

Please be reminded that if both State labor law and federal labor standards are applicable, the higher wage determinations and regulatory restrictions apply. Any project in this category should closely coordinate with their HOME Representative. It should be remembered, however, that the HOME Program will not monitor or audit for compliance with the State Labor Code. Such compliance will be a matter between the HOME Contractor and DIR.

As noted at the beginning of this section, the DIR is responsible for interpreting State prevailing wage laws, which includes SB 975, SB 972, and SB 966. It is highly recommended that State Recipients and CHDOs consult with DIR if they have any questions about whether their HOME construction-related activity triggers State prevailing wage and overtime provisions. It is also highly recommended that State Recipients and CHDOs consult the “California Department of Industrial Relations Precedential Public Work Decisions” (see Chapter III: Internet Resources). They may be reached by phone at: (415) 703-5050 or by email at: info@dir.ca.gov. DIR also maintains a website at <http://www.dir.ca.gov> that may also provide information about SB 975, SB 972, and SB 966.

Internet Resources

HUD Labor Standard Links

Office of Labor Relations (OLR) Library
<http://www.hud.gov/olr/library.cfm>

Making Davis Bacon Work: A Practical Guide for States, Indian Tribes and Local Agencies
(June 2001) <http://www.hud.gov/offices/olr/stindla.pdf>

Making Davis Bacon Work: A Contractor’s Guide to Prevailing Wage Requirements for Federally-Assisted Construction Projects (June 2001) <http://www.hud.gov/offices/olr/wagereq.pdf>

Labor Standards Administration and Enforcement Guidelines for HUD Program Participants (May 1996, Desk Guide LR-II) Provides answers to commonly asked questions for streamlining labor standard procedures. <http://www.hud.gov/offices/olr/olrguid2.cfm>

HOME Crosscutting Federal Regulations: Labor Standards and Contracting
<http://www.hud.gov/offices/cpd/affordablehousing/lawsandregs/fedreq/l/labor.cfm>

Application of Federal labor standards to HOME projects (August 21, 1996, Letter No. LR-96-02) http://www.hud.gov/olr/olr_9602.html

HUD forms:
http://www.hudclips.org/sub_nonhud/html/forms.htm

Department of Labor (DOL) Labor Standard Links

U.S. Department of Labor - Home Page

<http://www.dol.gov>

Davis-Bacon Act Index, prepared by Division of Fair Labor Standards (February 1990 revised)

<http://www.oalj.dol.gov/public/DBA/REFRNC/dbindex.htm>

Davis Bacon (DOL): Wage Determinations

<http://www.access.gpo.gov/davisbacon/>

DBRA Forms & Posters including:

- Report of Construction Contractor's Wage Rates (Form WD-10)
- Payroll Submission Form. This form may be used by contractors to submit certified weekly payrolls for contracts subject to the Davis-Bacon and related Acts. (Form WH-347)
- Request For Wage Determination And Response To Request (Form SF 308)
- Davis Bacon Poster (WH-1321 poster)

<http://www.dol.gov/esa/programs/dbra/forms.htm>

Excluded Parties Listing System – Home Page

<http://epls.arnet.gov/>

Davis Bacon and Related Acts: Frequently Asked Questions

<http://www.dol.gov/esa/programs/dbra/faqs.htm>

State of California Labor Standard Links

California Department of Industrial Relations (DIR) – Home page

<http://www.dir.ca.gov/>

*California Department of Industrial Relations Division of Labor Statistics and Research (DLSR)
Prevailing Wage Determinations*

http://www.dir.ca.gov/dlsr/statistics_research.html

California State Contractors License Board – Home page

<http://www.cslb.ca.gov/>

- *Contractor License Status Check by License Number*
http://www2.cslb.ca.gov/CSLB_LIBRARY/license+request.asp
- *Contractor License Status Check by Contractor Business Name*
http://www2.cslb.ca.gov/CSLB_LIBRARY/Name+Request.asp
- *Contractor License Status Check by Personnel Name*
http://www2.cslb.ca.gov/CSLB_LIBRARY/Personnel+Request.asp

California Department of Industrial Relations Precedential Public Work Decisions

Sorted by Date: <http://www.dir.ca.gov/dlsr/PrecedentialDate.htm>

Sorted by Topic: <http://www.dir.ca.gov/dlsr/PrecedentialAlpha.htm>

Chaptered Bills (referred to in Labor Chapter) amending the State Labor Code:

SB 975:

http://info.sen.ca.gov/pub/01-02/bill/sen/sb_0951-1000/sb_975_bill_20011014_chaptered.pdf

SB 972:

http://info.sen.ca.gov/pub/01-02/bill/sen/sb_0951-1000/sb_972_bill_20020928_chaptered.pdf

SB 966:

http://info.sen.ca.gov/pub/bill/sen/sb_0951-00/sb_966_bill_20031011_chaptered.pdf